IN THE

Supreme Court of the United States

OCTOBER TERM, 1951.

No. 169

J. HOWARD McGRATH, ATTORNEY GENERAL, AS SUCCESSOR TO THE ALIEN PROPERTY CUSTODIAN,

Petitioner,

vs.

KAKU NAGANO,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

BRIEF FOR RESPONDENT IN OPPOSITION.

OPINIONS BELOW.

The opinion of the District Court (R. 33-37) is reported at 88 F. Supp. 897. The opinion of the Court of Appeals (R. 54-65) is reported at 187 F. 2d 759.

JURISDICTION.

The jurisdictional requisites are adequately set forth in the petition.

QUESTIONS PRESENTED.

The questions presented by the petition are more adequately stated as follows:

1. Whether Section 39 of the Trading with the Enemy Act was intended to affect the right of return of property under Section 9(a) of the Act in a suit which was

(a) pending before the passage of Section 39; and
(b) brought by an alien admittedly resident within and loyal to the United States?

2. Whether in holding that respondent's temporary and transitory presence in Japan did not constitute her an enemy within the meaning of the Trading with the Enemy Act, the court below correctly applied to the particular facts of the present case the rule of construction which has been uniformly followed in the federal courts in repeated decisions since the enactment of the statute in 1917?

The petition alleges no conflict of decisions or other adequate grounds for requesting the Court to grant a review with respect to the second question.

STATUTES INVOLVED.

The statute involved is the Trading with the Enemy Act of 1917, as amended, with particular reference to Section 9(a) and the asserted effect upon it of Section 39 as enacted subsequent to the filing of the present suit. Indirectly involved, as they bear upon questions of construction, are other sections. The relevant sections and Executive Orders are set forth in the Appendix, *infra*.

STATEMENT.

These proceedings are concerned with a wife's minority interest[1] in her husband's company, The Fuji Trading Company, a corporation of Illinois organized in 1912. The present suit was filed on December 19, 1947 under Section 9(a) which provides for the return of vested property to persons who establish that they are non-enemies.

The Fuji Trading Company sells oriental food products such as chop suey vegetables and sauces, bean sprouts and water chestnuts, all of which are produced in the canning factory at 441 Huron Street, Chicago, erected and owned by the husband, Shinsaku Nagano, and leased to the business for the purpose of its operations (R. 3). The business itself was founded in 1910 by Mr. Nagano and under his sole management and direction it has for many years enjoyed national distribution of its products (R. 3, 55). The business has been described as Mr. Nagano's *alter ego.*[2] In time of war the business had no significance from a defense standpoint.

Mr. Nagano's permanent residence here (since 1906) and his loyalty to this country have never been questioned. They are material facts in view of the devotion between husband and wife and the common family plans which led to the wife's temporary absence in Japan. The husband's status is not merely technical; his identity with the com-

1. Out of 15,000 authorized and issued shares, the husband owns 9,315 shares and the wife owns 5,670 shares here involved, the remaining 15 shares being owned by her brother, who resides at Wilmette, Illinois, and is employed as the factory manager (see opinion, *Shinsaku Nagano* v. *McGrath*, 187 F. 2d 753, 755 *et seq.*).

2. See opinion, *Shinsaku Nagano* v. *McGrath*, 187 F. 2d 753, 755.

munity deep rooted. His investments are substantial and permanent. They have been always in Chicago, never in Japan. Mr. Nagano's testamentary plan for himself and his wife under his will executed in 1930 confirmed their Chicago residence and named a Chicago bank as trustee of his estate. He has been active in the affairs of the community, receiving, for example, the commendation of Rufus F. Dawes for his contributions as chairman of the Japanese Committee during the Century of Progress Exposition[2a].

No action has ever been taken against Mr. Nagano under the Trading with the Enemy Act. As a native born Japanese, however, under our naturalization laws he was not eligible to enjoy the privilege of citizenship in this country, and therefore he would be a national of Japan within the meaning of Section 39 if the position taken by petitioner were sound. Nevertheless, property of his which had been mistakenly vested in the belief that it belonged to an enemy has recently been returned to him in a Section 9(a) proceeding: *Shinsaku Nagano* v. *McGrath*, 187 F. 2d 753 (C. A. 7th, 1951). Petitioner has not sought a review of the latter decision and has therefore acquiesced in it.

At the outbreak of the war Mrs. Nagano was in Japan for temporary family purposes which were shared equally by herself and her husband, that is to say, making arrangements for the marriages of their two daughters.[3] It has never been claimed by the government that the husband's status as a loyal resident was affected by the family plan,

2a. Such evidence (in support of allegations of residence, R. 2, 6, 7, and admitted by motion to dismiss) is familiar to petitioner as part of the record in *Shinsaku Nagano* v. *McGrath*, 187 F. 2d 753.

3. Born in Japan, respectively, in 1914 prior to respondent's immigration to the United States, and in 1919 during a stay in Japan while on a voyage occasioned by Mr. Nagano's convalescence from influenza suffered during the severe epidemic of that year.

but because of the wife's physical presence in Japan not for any individual purpose but rather in carrying out the family purpose shared with her husband, the minority shares of stock owned by her in her husband's company were vested by the Alien Property Custodian. The Court below decided that on the allegations of the complaint the wife's temporary presence in Japan did not make her a resident within that country and that along with her husband she is a loyal resident of the United States. The petition for certiorari proceeds primarily upon the contention that, conceding the wife's friendly resident status as an ultimate fact, Section 39 of the Trading with the Enemy Act nevertheless prevents the return of her minority interest in her husband's company.

After residing in the United States since her immigration to this country in 1915, Mrs. Nagano in 1924 commenced the task of giving her son[4] the Oriental education which her husband considered an indispensable qualification to the son's ultimate entry into his father's business. Most of the raw materials used by the company were imported from the Orient by Mr. Nagano on purchasing trips which he was required to make once each year (R. 6). It was the common plan of both parents that Mr. Nagano might ultimately be relieved by their son of this extensive traveling in the Orient and left free to devote his entire time to the management of the business in Chicago.

A Japanese education for the daughters was considered desirable in order to enhance their prospects for marriage, limited as these were to members of their own race. All choice of decision on bringing the daughters to the United States was removed forever by the Oriental exclusion provisions of the Immigration Act of 1924, 43 Stat. 153, 8 U. S. C. A. 201 *et seq.* (R. 6, 19, 20, 56). In commencing the above task in furtherance of the purposes of the mar-

4. Born in Chicago in 1916.

riage of respondent and her husband, it was of course a fact that neither husband nor wife ever contemplated that the wife would be abandoning her permanent family residence with her husband in the United States or that she would be establishing a separate residence elsewhere (R. 6). The wife merely undertook a temporary family mission for reasons which were praiseworthy, which involved personal self sacrifice, and which were entirely consistent with her continued attachment to the United States as her residence and family home.

Mrs. Nagano rejoined her husband at Chicago in 1929 and again in 1932, each time remaining for nearly a year. In administrative proceedings the Department of Justice (Immigration Service) has found as a fact that on both of these occasions she entered as a permanent resident returning from a temporary absence abroad (R. 51). Absences from the United States prior to 1933 are therefore not material to the case. The factual issue presented by the above second question is whether the period from 1933 to 1941[5] represented a temporary and transitory absence, having in mind that the facts are undisputed and all inferences favorable to respondent are admitted by the motion to dismiss (R. 28-32).

In 1933 one daughter had already attained marriageable age; the other daughter would do so by 1937 (R. 6), and the son was old enough so that his mother's presence would no longer be necessary during the completion of his university education. During Mrs. Nagano's absence from 1933 to 1941 her efforts were devoted almost exclusively toward arranging marriages for the daughters (R. 6, 19). A record of these efforts is preserved in Mr. Nagano's voluminous correspondence (R. 7, 20), all written years

5. The war eliminated all possibility of return after 1941 until permission to return was obtained in 1950 (R. 49-51). Hence only the period 1933-1941 is involved.

before any such correspondence could be regarded as self serving. Her letters to her husband establish that progress was being made and that she had a lively expectation of an early consummation of her duties followed by a prompt and final return to the United States.

Such facts and others, including the corroborating testimony of persons in Japan, were reviewed by the United States Department of State in granting a visa under Section 4 (b) of the Immigration Act to Mrs. Nagano as a permanent resident returning from a temporary absence abroad (R. 49-50). Subsequently, upon respondent's physical entry into the United States, the Justice Department, Immigration Service, taking note of the period of absence, convened a Board of Special Inquiry which made a *de novo* investigation and then, on the basis of all the facts, the Immigration Service reached the conclusion (R. 50) that

> "there is ample evidence of record to support the conclusion reached by the Board of Special Inquiry and the American Consular Service that the Appellant is returning from a temporary visit abroad."

ARGUMENT.

I.

THERE IS NO CONFLICT OF DECISIONS ON EITHER OF THE TWO ISSUES RELIED UPON BY THE PETITIONER.

1. There is no conflict of decisions between the Courts of Appeals for the Seventh Circuit and for the District of Columbia on the issue of whether Section 39 of the Trading with the Enemy Act applies to a Section 9(a) suit *pending before the enactment of Section 39.*[6] Under such circumstances neither court considers Section 39 to be applicable to the *Nagano* case.

In the case of *McGrath* v. *Zander*, 177 F. 2d 649, 652 (1949), the Court of Appeals for the District of Columbia had before it a Section 9(a) suit filed before the enactment of Section 39 but not decided until subsequent thereto. In the briefs the government relied upon Section 39, contending that plaintiff was a German citizen and therefore a "national" of Germany within the prohibitions of Section 39. The court held, however, that regardless of questions of nationality plaintiff was entitled to recover since she was not "resident within" Germany,—a conclusion which could not have been reached if Section 39 had been held to be applicable.

In the case of *Guessefeldt* v. *McGrath*,[7] which is the very case relied upon by the petitioner for the alleged conflict of decision concerning Section 39, the *Zander* case was distinguished by the District Court on the ground that it

6. The present case was filed December 19, 1947 (R. 2). Section 39 was enacted on July 3, 1948.

7. Pending before this Court on petition for certiorari, October term, No. 204.

was filed before the enactment of Section 39, the court stating (89 F. Supp. 344, 348):

> "Plaintiff relies heavily on the *Stadtmuller* case, *supra*, decided in 1926, and the *Zander* case, *supra*, decided by our Court of Appeals in 1949. The *Stadtmuller* case was decided long before the enactment of Section 39 of the Act and cannot be controlling here. While reference is made to Section 39 in the briefs submitted to the Court in the *Zander* case by the parties thereto and by the *amici curiae*, it should be noted that that case was filed in this Court on March 24, 1948, while Section 39 was not passed by the Congress and approved by the President until July 3, 1948."

The distinction made by the Court was a substantial one. The federal statutes contain an express saving clause to the effect that when a statute is repealed the repeal shall not release any liability incurred under the statute unless the repealing Act shall expressly so provide: Title 1 U.S.C.A. 109 (*infra*, App. p. v). This statute has been held to be a rule of construction applicable when not otherwise provided, as a general saving clause to be read and construed as a part of all subsequent repealing statutes, in order to give effect to the will and intent of Congress: *Hertz* v. *Woodman*, 218 U. S. 205, 216, 217 (1910). Section 39 does not specifically mention Section 9(a) and is not a bar to the instant action unless it is assumed that Congress intended a retroactive repeal of Section 9(a) by implication. The argument that Section 9(a) was repealed, in whole or in part, by mere implication, is completely refuted by *Markham* v. *Cabell*, 326 U. S. 404, 410 (1945). In that case the Custodian made a similar contention that the Settlement of War Claims Act of 1928 effected a partial repeal by implication of Section 9(a) and the Court replied,

> "The right to sue, explicitly granted by Section 9(a), should not be read out of the law unless it is clear that Congress by what it later did withdrew its earlier permission."

But the thought that Congress could have intended to take such action retrospectively with respect to residents who are entitled to the protection of the Fifth Amendment to the federal Constitution is repugnant to our sense of justice. Retroactive legislation is not favored by the courts and retroactive construction is not given to legislation unless the language employed is so clear that it will admit of no other construction.[8] No court has ever suggested that Section 39 should be given retroactive application. There is no conflict whatsoever on this point.

2. The Court of Appeals for the Seventh Circuit and the Court of Appeals for the District of Columbia are in complete accord with each other and with the cases decided since the enactment of the Trading with the Enemy Act in 1917 with reference to the issue of whether or not respondent must be regarded as "resident within" Japan.[9]

Having sought to bring the Section 39 issue before the Court on the ground of an alleged conflict between circuits, the petitioner is in the position of seeking review upon the independent and wholly unrelated issue of "residence within" without the grounds ordinarily recognized by the Court as a basis for seeking review by certiorari. Indeed, it is not even claimed by petitioner that any conflict of decisions exists on the latter issue.

In the *Guessefeldt* case the District Court and the Court of Appeals were both in agreement with the holding below in the Nagano case on the meaning of the term "resident within." The District Court held that in order for Guessefeldt to have established residence in Germany there would have had to be both an intention to abandon the old and to remain in the new domicile—as some authors say, *animus*

8. Sutherland on Statutory Construction (3rd Ed., 1943), Vol. 2, Secs. 2201, 2212.

9. For cases in accord, see cases cited, *infra*, p. 18.

non revertendi and *animus manendi*.[10] On appeal, the Court of Appeals for the District of Columbia agreed with the District Court, citing *McGrath* v. *Zander*, 177 F. 2d 649, decided by that Court in 1949, and stating that the *Zander* case affirmed the rule in *Stadtmuller* v. *Miller*, 11 F. 2d 732 (C.C.A. 2d, 1926). It was specifically stated that, except for the provisions of Section 39, Guessefeldt would have been entitled to maintain a Section 9(a) suit.

It would seem apparent that if the Supreme Court should see fit to grant certiorari the scope of the review ought to be confined to Section 39 with respect to which the petitioner has claimed that there exists a conflict between two circuits.

II.

THE DECISION BELOW IS CLEARLY CORRECT.

1. In enacting Section 39 Congress had no intention of amending Section 9(a) providing for the return of friendly property. On the contrary, the concern of Congress was with a wholly different object, namely, to express the irrevocable policy decision that *enemy* property would not ever be returned to former enemies as was done after World War I.[11] This intention is plainly evident from the *functions* of Section 39 within the framework of the related provisions of the Act. It is no less evident from the language of the Act and from its legislative history.

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10. 89 F. Supp. 344, 347.

11. So held below in the District Court (R. 36-37) and in the Court of Appeals (R. 64).

(a) *Functions of Section 39.* Initially property is seized by the Alien Property Custodian on suspicion that it is enemy property, the action being taken on appearances and without investigation.[12] By definition, Section 9(a) is a proceeding for the return of property to "*any person not an enemy* claiming any interest, right or title in any money or other property which may have been seized by him" (the Custodian).[13]

Under Section 2(a) of the Act "residence within" the enemy country is made the test for determining whether an individual is an "enemy",[14] so that in a Section 9(a) suit the issue is made to turn upon residence and not upon nationality. In World War II the necessity of coping with disguised enemy interests gave rise to a broadened concept of "enemy" as expressed in the term "national of a designated enemy country."[15] The broadened term permitted persons, even United States citizens, to be defined as such "nationals" if they were acting on behalf of ("including cloaks for") the enemy.[16] The residence test, however, was retained, with the result that persons not "resident

12. "If he has a strong suspicion that property is German property it is his conscientious duty to vest it. Subsequent investigation may indicate that he was *mistaken*, and in such a case he will return the property":—testimony of Max Isenbergh, Chief, Appeals and Legislative Branch, Office of Alien Property, Justice Department, given before subcommittee of the Senate Committee on the Judiciary in hearings on the War Claims Act, 80th Congress, Second Session, page 13 of printed report of hearings. See also *Clark* v. *Uebersee Finanz-Korporation*, 158 F. 2d 313 at 315 to the same effect. And see *Lamar* v. *Browne*, 92 U.S. 187, 196 (1875): "The military forces act in the field, according to the laws of war and seize that which is *apparently* the subject of capture. They act upon appearances, not upon testimony * * *"

13. See Section 9(a), *infra*, App. p. i.

14. Section 2(a), *infra*, App. p. i.

15. Defined in Executive Orders 8389 and 9095 promulgated under the authority of Section 5(b), *infra*, App. pp. i, iii, iv.

16. Executive Order 8389, par. 5E(ii, iv), *infra*, App. p. iii.

within" the enemy country are not considered "nationals" thereof by reason of enemy citizenship alone.[17] Indeed, it is this issue of whether Mrs. Nagano was "resident within" Japan which petitioner seeks to have reviewed by this Court.

Section 9(a) is, therefore, concerned exclusively with the return of non-enemy (that is to say, friendly) property, determined according to the test of residence.

After Section 9(a) returns have been completed, the fund of property remaining in the hands of the Custodian consists of enemy property alone. Obviously it is necessary to look elsewhere in the Act than Section 9(a) to ascertain what disposition is contemplated for this enemy fund. A direct provision in this regard is found in Section 12, providing:

> "After the end of the war any claim of any enemy or ally of enemy to any money or other property held by the Alien Property Custodian * * * shall be settled as Congress shall direct."

After the end of World War I the fund of enemy property referred to in Section 12 was first retained under the provisions of the Resolution of Congress terminating the war with Germany, July 2, 1921, 42 Stat. 105-107, and finally returned in part (80% returned, 20% retained) under the Settlement of War Claims Act of 1928, 45 Stat. 254-279.

After the end of World War II two sections provided for the disposition of the fund in question: Section 32(a) and Section 39. Section 32(a) provided for returns as a matter of administrative discretion to persecutees and other individuals who are technically enemies and who would not be entitled to the return of property under Section 9(a).[18]

17. See authorities and exception in Executive Order 9095 cited and discussed, *infra*, pp. 16, 17.

18. *McGrath* v. *Zander*, 177 F. 2d 649, 652 (C.A.D.C. 1949); see Sec. 32(a), *infra*, App. p. ii, containing pertinent provisions omitted from the reproduction of that section in the government's petition, Appendix A therein.

Section 39 provides that "*The net proceeds remaining upon the completion of administration, liquidation and disposition pursuant to the provisions of this Act*" shall not be returned to nationals of Germany or Japan, but "shall be covered into the Treasury" to be applied in payment of certain war claims.[19]

If Section 39 is considered solely from the standpoint of its mechanical function, it will be seen that there are only two possible functions, as follows:

> (i) To dispose of the "net proceeds" remaining in the hands of the Custodian after administration, liquidation, and disposition pursuant to the other provisions of the Act. Such proceeds consist of the fund of enemy property remaining after the property taken by mistake has been returned, under Section 9(a), to non-enemy owners as a part of the "disposition" referred to in Section 39. It is the same fund of enemy property which remained after the end of World War I, 80% of which was ultimately returned to former enemies not pursuant to Section 9(a) but as a forgiveness measure.

The Court below held that the foregoing is the function of Section 39.

If the function of Section 39 is not as above stated then, alternatively, the function *must* be:

> (ii) To retain, in addition to enemy property, all property whether taken by mistake or not, and whether in friendly hands or not, which belongs to persons who are citizens of Germany or Japan regardless of whether such persons are lifelong loyal residents of the United States.[20]

The second function represents the position asserted by the petitioner herein.

It is readily apparent that the second function is un-

19. *Infra*, App. p. iii.

20. As asserted by the government in *Shinsaku Nagano* v. *McGrath*, 187 F. 2d 753; see *supra*, p. 4.

conscionable and that it has no logical relationship to the framework of the Act. No such relationship is suggested in the petition. In contrast, the first function permits the parts of the Act—Sections 9(a), 12, 32(a) and 39 to work together as parts of an integrated whole.[21]

(b) *Language of Section 39.* (i) As has been pointed out in discussing the functions of Section 39, the subject matter upon which it operates is not all property vested, but only "net proceeds" consisting of enemy property remaining after Section 9(a) returns as a part of the "administration, liquidation and disposition pursuant to the provisions of this Act."[22] The return of non-enemy property under Section 9(a) is essential to the constitutionality of the Trading with the Enemy Act: *Central Trust Co.* v. *Garvan*, 254 U. S. 554, 566 (1920); *Becker* v. *Cummings*, 296 U. S. 74, 79 (1935). Only the remaining net fund consisting of enemy property is without the constitutional protection.

Since the fund dealt with by Section 39 consists only of enemy property not returnable under Section 9(a) it is immaterial to the present case that the latter fund may not be returned to "nationals" of Germany or Japan even if such "nationals" are assumed to include friendly American residents.

Section 32(a) contains specific provisions for the return of certain enemy property to persecutees who are technical enemies.[23] Thus it was essential that Section 39 should in-

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21. In *Markham* v. *Cabell*, 326 U.S. 404, in holding to the effect that by amending Section 5(a) Congress did not intend to delete Section 9(a) the court said: "The normal assumption is that where Congress amends only one section of a law, leaving one untouched, the two were designed to function as parts of an integrated whole."

22. Section 9(a) contains both administrative and dispository provisions.

23. *Supra*, p. 13 and note 18.

clude an express exception as to Section 32(a). The fact that Section 9(a) is not referred to in Section 39 does not evidence any intent to repeal Section 9(a) but on the contrary evidences that Section 9(a) is concerned with a wholly different fund, *i. e.*, friendly property.

(ii) Even if the entire issue with respect to Section 39 is made to turn upon the literal meaning of one word, "national",[24] without regard to any of the foregoing considerations, the same result is still reached. In Section 39 the word "national" is used in the sense of "national of a designated enemy country" (except that it is restricted to the enemy countries of Germany and Japan). The word is necessarily used in such a sense because "nationals of a designated enemy country" are the only class of nationals made subject to the vesting process in the first place.[25] Such enemy nationals, however, could not in any event succeed under Section 9(a): *Clark* v. *Uebersee Finanz-Korporation*, 332 U. S. 480, 486, 487 (1947). Their suit would fail, under the provisions of Section 9(a), not Section 39.[26] Conversely, a person who is entitled to recover under Section 9(a) succeeds because he has been found not to be a "national of a designated enemy country"; he is equally not a "national" within the meaning of that word as used in Section 39. Moreover, persons who are residents of the United States or who were not "resident within" the enemy country are not "nationals of a designated enemy country." Executive Order 9095, as amended, excludes from the definition of such "nationals" persons not within the enemy country;[27] neither the President nor the Con-

24. The decision in the *Guessefeldt* case and the argument of the government are predicated almost entirely on the asserted literal meaning of the word "national."

25. *See*. 5(b) and Executive Orders 8389 and 9095, *infra*, App. pp. i, iii, iv.

26. Precisely as stated by Judge Campbell (R. 36).

27. *Infra*, App. p. iv.

gress has at any time modified the traditional policy of this country that our own residents are not enemies, regardless of technical enemy citizenship; the courts have held likewise;[28] and finally, the government's petition itself (pp. 6, 11-13) agrees that "residence within" is the fundamental issue determinative of whether respondent is a "national of a designated enemy country."

The opinion of the court below respecting the true meaning of "citizen" (R. 64) thus corresponds with the literal and technical meaning of the word "national" as used in Section 39.

(c) *The legislative history.* The legislative history of Section 39 prior to its passage is notable for the absence of any reference to Section 9(a) in the hearings or in the Congressional debates. The expression of any intention to repeal or supersede the latter section is totally absent. Especially notable, however, is the abundance of affirmative evidence that the legislators were concerned solely with the net fund of *enemy* property remaining after administration and disposition under existing law, including returns provided under Section 9(a). The scope of the present brief makes it impracticable to review here the legislative history (portions of which are set forth in the opinion of the court below, R. 61, 63, 64). It is, however, respectfully submitted that the non-applicability of Section 39 to proceedings under Section 9(a) is fully evident from a consideration of the functions and language of the two sections within the framework of the Act.

2. There is no merit in the remaining contention of petitioner, namely, that respondent was "resident within" Japan, nor is there any merit in the related claim that any question of construction exists respecting the words "resident within" as used in the statute.

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28. Opinion below (R. 59-60); *Guessefeldt* v. *McGrath* (not yet reported), see petition herein for certiorari, Appendix B, p. 24; *McGrath* v. *Zander*, 177 F. 2d 649 (C.A.D.C., 1949).

One indication of the lack of merit to petitioner's contention is the complete accord of the decisions below, in the instant case and also in the companion *Guessefeldt* case, as well as the prior decisions including *McGrath* v. *Zander*, 177 F. 2d 649 (C. A. D. C. 1949); *Sarthou* v. *Clark*, 78 F. Supp. 139 (D. C. Cal., 1949); *Stadtmuller* v. *Miller*, 11 F. 2d 732 (C. C. A. 2d, 1926); *Vowinckel* v. *First Federal Trust Co.*, 10 F. 2d 19 (C. C. A. 9th, 1926); and *Miller* v. *Sinjen*, 289 Fed. 388 (C. C. A. 8th, 1923). All of these cases support the reasonable principle that presence in a country for purposes of a merely temporary character falls short of establishing residence. Seldom indeed has there been a more consistent *absence* of conflict among the decisions.

It is not possible for legal niceties to arise as to what "resident within" means in the face of facts alleged or competent under the complaint including (a) respondent's admitted residence in the United States (R. 2, 3, 51); (b) her admitted lack of any intention to surrender that residence (R. 3, 51); (c) the circumstances of compulsion characterizing her absence in Japan (R. 6, 7, 19, 20); (d) the admitted temporary character of that absence (R. 6, 7, 19, 20, 51); and (e) the concurrence of the State Department and the Justice Department, after independent investigations and hearings, in the finding that Mrs. Nagano was a permanent resident of the United States whose absence in Japan was a temporary visit only (R. 49-51).

Taken in combination, the foregoing considerations surely foreclose any conclusion at this time that respondent was "resident within" Japan. Having been correct on the facts, the decision below presents no need for any construction of the phrase "resident within".

Moreover, it is implicitly admitted in the government's petition and brief (pp. 11-13) that the mere presence of

respondent in Japan would not make her a "resident within" an enemy country if two conditions are met: (1) that her presence was the result of compulsion or (2) that her presence was temporary. Not just one but both of these conditions are met in the present case.

Petitioner has contended that Mrs. Nagano's stay in Japan was an exercise of free choice. But as already stated, her daughters were compelled by our immigration laws to make their permanent home in Japan. The daughters could not plan a life in this country because, being of Japanese birth, they could not be here more than temporarily under any circumstances. The election to arrange marriages in Japan was compulsory because our immigration laws made it so. Moreover it was an act of both husband and wife, in carrying out a duty of their marriage.

The choice offered to Mr. and Mrs. Nagano was as "voluntary" as a parent voluntarily paying a ransom to a kidnaper. They did indeed have a choice; they could abandon their children or the wife could remain with them in Japan for the temporary period during which the presence there of one of the parents remained indispensable. Mrs. Nagano remained in Japan, but that she did so only under the compulsion of these circumstances is established by a mass of evidence, including a great deal of correspondence with her husband (R. 7, in evidence in the companion case of *Shinsaku Nagano* v. *McGrath*, 187 F. 2d 753, no review of which decision has been sought by the government). Certainly, petitioner cannot contend that the compulsion must be exercised by the enemy government. It would be intolerable for the United States to justify the seizure of property because of a temporary absence of the owner for which the United States itself was largely responsible.

Moreover, it is significant to consider that in all the

decided cases involving presence in the enemy country the original entrance into or sojourn within the country was invariably voluntary. Only after the commencement of hostilities did constraint arise: *Vowinckel* v. *First Federal Trust Co.*, 10 F. 2d 19 (C. C. A. 9th, 1926); *Stadtmuller* v. *Miller*, 11 F. 2d 732 (C. C. A. 2d, 1926); *Miller* v. *Sinjen*, 289 Fed. 388 (C. C. A. 8th, 1923); *Sarthou* v. *Clark*, 78 F. Supp. 139 (D. C. Cal., 1949); *McGrath* v. *Zander*, 177 F. 2d 649; *cf.* also the related case, *Guessefeldt* v. *McGrath*, now pending before this Court on petition for certiorari. Plainly Mrs. Nagano, as a native-born Japanese, had not the slightest opportunity of gaining readmission to this country or permission to depart from Japan after the war began.

The question whether the period of 1933 to 1941 represented a temporary absence is a fact question dependent not on the length of the period but on the circumstances of the absence. The very reasons for the absence were of a self limiting character. Both Mrs. Nagano and her husband expected the marriages to be arranged within a relatively short period. Her correspondence reported progress; in fact, on occasion, arrangements were all but completed. In the plans of Mrs. Nagano and her husband her absence in Japan was not only transitory but in effect she was packed and ready to leave by the next ship. Also it must be remembered that the evidence includes not only the purpose of the absence but the whole background of circumstances establishing the permanent American residence of both husband and wife. These circumstances, too, bear upon the temporary character of Mrs. Nagano's absence. It is neither realistic, nor just, nor consistent with the facts and inferences admitted by a motion to dismiss, for petitioner to urge that Mrs. Nagano was resident within Japan.

On the basis of the admitted facts no borderline case is

presented which involves, as urged by the government, any question of construction of the words "resident within". The fallacy of petitioner's position is that instead of presenting a substantial question of law, petitioner is merely seeking to draw inferences in direct conflict with the admitted facts.

In its petition and brief the government makes the incorrect statement that the Court below equated residence to domicile. Petitioner then argues the well known rule that residence is not identical with domicile. Of course the obvious answer is that the court below was not even concerned with domicile. It was concerned only with residence, within the settled meaning which has been given to that term by the courts through a long series of cases (R. 59). No need for subtleties of definition exists to recognize the simple fact that although one may have a residence which is different from the domicile one may also be present in a locality without being a resident. Residence, in other words, is something more than a transitory stay or a visit for temporary purposes. Like domicile, residence does involve an intent to establish residence and it involves a certain stability; in effect it involves at least a settled and permanent abode partaking to some degree of domiciliary qualities, as stated in *Sarthou* v. *Clark*, 78 F. Supp. 139 (D. C. Cal., 1949), quoted and approved in *McGrath* v. *Zander*, 177 F. 2d 649 (C. A. D. C., 1949).

The government has made the additional assertion that the holding below with regard to residence is "in conflict in principle with numerous decisions" (Brief, pp. 6, 13n). This not only overlooks the pertinent cases which are in complete accord on the issue of residence (cases cited *supra*, page 18), but it misses the fact that out of the long list of cases cited by the government (Brief, p. 13n), not one case can be found involving a suit under Section

9(a) of the Trading with the Enemy Act. Moreover not a single one of the cases cited by petitioner involves the question of defining the words "resident within."[29]

III.

THERE IS NO IMPORTANT QUESTION OF FEDERAL LAW.

Since the decision below was right on the facts; since the decision below was in accord with the settled line of authority on the "resident within" issue; and since there exists no conflict with other decisions, no important question is presented to this Court on the issue of respondent's residence.

In addition to the fact already pointed out that the present suit was filed before the enactment of Section 39 so as to present no questions under that Section, it would be equally true that no important question arises under Section 39 even if that Section were to be given a retroactive application.

(a) In order that there may be a question there must exist at least some reasonable doubt as to the correct application of Section 39. As has been demonstrated the fund dealt with by Section 39 consists entirely of enemy property. Prohibitions respecting a fund consisting only of enemy property cannot affect suits arising under Section 9(a). Therefore no significance whatever can attach to the statement in the petition as to the number of suits pending[30] under Section 9(a).

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29. In each case cited the parties were admittedly residents within the enemy country; in three of the cases (*Faber* v. *United States*, 10 F. Supp. 602; *Miller* v. *Paul*, 237 Ill. App. 166; and *Wirtele* v. *Grand Lodge*, 111 Neb. 302) the parties not only lived in but died in Germany; and another case, *United States* v. *Krepper*, 159 F. 2d 958 (C.A. 3rd, 1946), was a criminal prosecution for a violation of a censorship statute in writing a letter in time of war to an enemy agent.

30. Petition, p. 14.

(b) Any property belonging to an American resident has been vested either in error or because he is deemed to be an enemy on grounds other than nationality. In such case, if he is an enemy, a Section 9(a) suit would fail on that ground. *It is extremely difficult to believe that the government is asserting that it has vested any consequential amount of property belonging to American residents who are not enemies.* It is to be doubted that any such startling interpretation should be drawn from the meager statement in the government's petition for certiorari (p. 14) that 47 cases are pending which "involve" Section 39. The manner in which Section 39 is involved is not stated, but the more probable interpretation is that in suits brought by persons who are allegedly enemies Section 39 is being invoked as a defense notwithstanding that a defense exists under Section 9(a). In such case the assertion that Section 39 is involved is meaningless.

Conclusion.

It is accordingly submitted that no conflict between circuits exists with reference to the matters upon which review is sought; that the judgment of the Court below was correct; that no important issues of law are involved, and that the petition for certiorari should be denied.

In the event that the Supreme Court should nevertheless determine that a review should be granted, it is submitted that the scope of the review should be expressly limited to the single issue upon which any claim of conflict between circuits is made by the government; that is to say, the alleged applicability of Section 39 to proceedings under Section 9(a) of the Trading with the Enemy Act.

Respectfully submitted,

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APPENDIX.

Excerpts from the Trading with the Enemy Act of 1917, as amended (U. S. C. A. Title 50 Appendix):

§ 2. Definitions. The word "enemy" as used herein, shall be deemed to mean, for the purposes of such trading and of this Act—

(a) Any individual * * of any nationality, resident within the territory * * of any nation with which the United States is at war * *.

§ 5(b) (as amended on December 18, 1941 by Title III of the First War Powers Act (U. S. C. A. Title 50, pocket part, Appendix Sec. 5(b)). During the time of war * * any property or interest of any foreign country or national thereof shall vest when, as and upon the terms directed by the President * *.

§ 7(c). If the President shall so require any money or other property * * belonging to or held * * for the benefit of, an enemy * * may be seized by the Alien Property Custodian * *.

§ 9(a). Any person not an enemy * * claiming any interest, right or title in any money or other property which may have been seized by him (the Custodian) hereunder * * may file with the said custodian a notice of his claim * *. * * if the claimant shall have filed the notice as above required, said claimant may institute a suit in equity * * in the district court of the United States for the district in which such claimant resides * * to established the interest, right, title or debt so claimed, and if so established, the court shall order the * * delivery to said claimant of the money or other property so held by the Alien Property Custodian.

§ 12. * * After the end of the war any claim of any enemy or of an ally of enemy to any money or other property received and held by the alien property custodian or deposited in the United States Treasury, shall be settled as Congress shall direct * *.

§ 32(a). The President, or such officer or agency as he may designate, may return any property or interest vested in or transferred to the Alien Property Custodian (other than any property or interest acquired by the United States prior to December 18, 1941), or the net proceeds thereof, whenever the President or such officer or agency shall determine—

(1) that the person who has filed a notice of claim for return, in such form as the President or such officer or agency may prescribe, was the owner of such property or interest immediately prior to its vesting in or transfer to the Alien Property Custodian, or is the legal representative (whether or not appointed by a court in the United States), or successor in interest by inheritance, devise, bequest, or operation of law, of such owner; and

(2) that such owner, and legal representative or successor in interest, if any, are not—

* * * * *

(D) an individual who was at any time after December 7, 1941, a citizen or subject of Germany, Japan, Bulgaria, Hungary, or Rumania, and who on or after December 7, 1941, and prior to the date of the enactment of this section (March 8, 1946) was present (other than in the service of the United States) in the territory of such nation or in any territory occupied by the military or naval forces thereof or engaged in any business in any such territory, Provided That notwithstanding the provisions of this subparagraph (D) return may be made to an individual who, as a consequence of any law, decree or regulation of the

nation of which he was then a citizen or subject, discriminating against political, racial or religious groups, has at no time between December 7, 1941 and the time when such law, decree or regulation was abrogated, enjoyed full rights of citizenship under the law of such nation; * *

§ 39 (War Claims Act of 1948, Public Law 896, 80th Congress, 2nd Sess.) No property or interest therein of Germany, Japan, or any national of either such country vested in or transferred to any officer or agent of the Government at any time after December 17, 1941, pursuant to the provisions of this Act, shall be returned to former owners thereof or their successors in interest, and the United States shall not pay compensation for any such property or interest therein. The net proceeds remaining upon the completion of administration, liquidation, and disposition pursuant to the provisions of this Act of any such property or interest therein shall be covered (sic) into the Treasury at the earliest practicable date. Nothing in this section shall be construed to repeal or otherwise affect the operation of the provisions of Section 32 of this Act or of the Philippine Property Act of 1946.

Excerpts from Executive Order 8389 (April 10, 1940, 5 F. R. 1400 as amended by Ex. Ord. No. 8785, June 14, 1941, 6 F. R. 2897; Ex. Ord. No. 8832, July 26, 1941, 6 F. R. 3715; Ex. Ord. No. 8963, Dec. 9, 1941, 6 F. R. 6348; Ex. Ord. No. 8998, Dec. 26, 1941, 6 F. R. 6787):

5. * * E. The term "national" shall include,

(i) Any person who has been domiciled in, or a subject, citizen or resident of a foreign country at any time on or since the effective date of this Order, * *

(ii) Any person to the extent that such person is, or has been, since such effective date, acting or purporting to act directly or indirectly for the benefit or on behalf of any national of such foreign country, and

(iv) Any other person who there is reasonable cause to believe is a "national" as herein defined * *.

Excerpts from Executive Order No. 9095 (March 11, 1942, 7 F. R. 1971, as amended Ex. Ord. No. 9193, July 6, 1942, 7 F. R. 5205; Ex. Ord. No. 9567, June 8, 1945, 10 F. R. 6917):

2. The Alien Property Custodian is authorized and empowered to take such action as he deems necessary in the national interest, including, but not limited to, the power to direct, manage, supervise, control or vest, with respect to:

(a) Any business enterprise within the United States which is a national of a designated enemy country * * and any interest of any nature whatsoever in such business enterprise held by an enemy country or national thereof;

(b) Any other business enterprise within the United States which is a national of a foreign country * * and any interest of any nature whatsoever in such business enterprise held by a foreign country or national thereof, when it is determined by the Custodian and he has certified to the Secretary of the Treasury that it is necessary in the national interest, with respect to such business enterprise, either (i) to provide for the protection of the property, (ii) to change personnel or supervise the employment policies, (iii) to liquidate, reorganize or sell, (iv) to direct the management in respect to operations, or (v) to vest.

10. For the purpose of this Executive Order:

(a) * * The term "national" shall have the meaning prescribed in section 5 of Executive Order No. 8389, as amended, *provided, however*, that persons not within designated enemy countries * * shall not be deemed to be nationals of a designated enemy country unless the Alien Property Custodian determines: (i) that such person is controlled by or acting for or on behalf of (including cloaks for) a designated enemy country or a person within such country; or (ii) that such person is a citizen or subject of a designated enemy country and within an enemy occupied country or area; or (iii) that

the national interest of the United States requires that such person be treated as a national of a designated enemy country.

1 U. S. C. Sec. 109. The repeal of any statute shall not have the effect to release or extinguish any penalty, forfeiture, or liability incurred under such statute, unless the repealing Act shall expressly so provide, and such statute shall be treated as still remaining in force for the purpose of sustaining any proper action or prosecution for the enforcement of such penalty, forfeiture or liability.